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TRIAL BY JURY IN CIVIL ACTIONS.

Through the kindness of Mr. John W. Hinsdale, president of the North Carolina Bar Association, we have been furnished with the following copy of his address before the Bar Association of that state upon the subject of trial by jury in civil actions. As his views so nearly accord with those often set forth in our columns, it gives us a peculiar pleasure to be able to publish this learned address.

Mr. Chairman and Gentlemen of the North Carolina Bar Association:

As incoming President of your Association, I have the pleasure of addressing you upon a subject which concerns lawyers more deeply perhaps than any other, because it is the warp and woof of their professional life; which concerns the public at large, because the security of life, liberty and property is dependent upon it, and which, on account of its importance, has given rise to the most earnest and able disquisitions of lawyers, statesmen and philosophers, evincing a growing dissatisfaction and an increasing desire for change. It is a subject, to which for forty-four years of an active professional life I have given my best thought. I shall with great diffidence express to you to-day my views and convictions about *trial by jury of civil actions.*

My remarks will be directed to the principal questions:

FIRST: *Whether jury trial of civil actions should be abolished, and if so, what is the best substitute.*

SECOND: *How can the system of trial by jury be improved?*

It is not necessary, except in a general way, to trace the origin and development of jury trial.

Juries in some form were known in England at a very early age. Their invention has been imputed to Alfred the Great, to

whom, as Blackstone says, on account of having done so much, it is usual to attribute everything. It varied in numbers. The jury of twelve men is certainly as old as Edward III. The magic number twelve is supposed to have originated from the number twelve running through the teachings of the Semitic race, as the twelve guides sent into Canaan to seek and report the truth, the twelve prophets to foretell the truth, the twelve apostles to preach the truth, the twelve stones upon which the heavenly Jerusalem was built, and, therefore, whenever twelve jurors agreed, the truth was unfolded.

The assize, as the jury was called, was originally composed entirely of witnesses who found the facts upon their own personal knowledge. The old practice was to add a given number of jurors from time to time, until twelve were found to agree. Later, evidence was offered, but the jury was at liberty to disregard it. Later still, it was required to find according to the evidence. The rule of requiring a unanimous verdict was immediately connected with the original character of the jury, as a body of witnesses, and, as Mr. Forsyth says, with the conception common in primitive society, that safety is to be found in the number of witnesses rather than in the character of their testimony. The practice of forcing juries to agree, by the harsh methods resorted to, is quite a commentary on the value of unanimity. Even in our day, it has been held proper for the court to threaten to hold the jury together until the end of a two weeks term, in order to persuade a minority juror to waive his convictions and agree with the majority. (Osborn *v.* Wilkes, 108 N. C. 653.)

Jury trial has been lauded to the skies, as the palladium and bulwark of our liberties. And it has deserved well of its country in the trial of criminal cases.

There was a time, in England, when the jury in political prosecutions stood as a stone wall between the crown and the persecuted subject. Subservient judges, creatures of the government, sought to convict at the behest of their royal masters. But, juries stood firm, and, at the risk of fine and imprisonment, refused to be coerced. For example:

A jury, in 1554, against all the pressure that could be brought to bear upon it by a brutal judge, the willing tool of the crown,

acquitted Sir Nicholas Throckmorton of high treason. They were immediately thereafter committed to prison. Four made submission, declaring that they were wrong. The other eight remained in imprisonment for many months, when they were sentenced to the payment of enormous fines.

In 1670, William Penn was tried before a jury for seditious speech at a Quaker meeting. The presiding judge was most violent in his efforts to intimidate the jury. The prisoner was not allowed the benefit of counsel, as was the custom in those evil days, on the idea that an innocent person needed none, and a guilty person deserved none. The jury acquitted him. Dissatisfied with the first verdict, the judge heaped upon the jury every opprobrious epithet. At last the jury, who had received no nourishment for two days and two nights, on the third day again gave the verdict of not guilty. They were heavily fined for their independence.

The freedom of the press so virulently assailed in those troublous times, owed its vigorous existence to the manhood of the juries.

But, it was not always thus, as shown by the bloody assizes held by the infamous Jeffries. By the aid of weak and corrupt juries, 841 prisoners who had been rebels under the Duke of Monmouth, were transported, and 320 were hanged, which affords a fatal proof that judicial forms and constitutional establishments may be rendered unavailing by the subservience or prejudice of those who are appointed to carry them into effect, and as Mr. Alison remarks, it demonstrates how extremely fallacious is the reliance which is generally placed in the institution of jury trial as at all times the bulwark of freedom and the shield of oppressed innocence.

The days of corrupt judges and wicked persecutions by the crown are happily passed. Our liberties are no longer in danger from this source. We no longer stand in need of the jury to protect us from governmental assault. But, the halo of glory which surrounds this institution by reason of the splendid conduct of juries in the state trials of past ages, still dazzles us with its splendor, and unborn generations will cling to it, *in criminal cases,* with increasing tenacity, love and admiration.

We now come to the consideration of a very different question:

JURY TRIAL IN CIVIL ACTIONS IS NOT ALWAYS SATISFACTORY.

Divesting ourselves of all bias by a blind prepossession in favor of the present mode of trial, and uninfluenced by an unreasonable veneration for its antiquity, our inquiry is what is the best and surest way to reach the truth in civil cases.

Courts are established for the single purpose of ascertaining the truth, and doing justice. They abhor wrong, as nature does a vacuum; and yet, my brother lawyers, we are so accustomed to the spectacle of the failure of justice in civil cases by the erroneous verdicts of a jury, that we no longer look upon it with surprise. We all know how difficult it is for a corporation, with no body to be kicked and no soul to be damned, to secure a verdict. One of our private citizens will win upon "trifles light as air," while "confirmation strong as proofs of Holy writ," is necessary to enable railroad, telegraph or insurance companies to prevail.

The juries seem to follow the example of Themistocles, who, as Plutarch relates, when told that he would govern the Athenians extremely well if he would but do it without respect to persons, said: "May I never sit on a tribunal where my friends shall not find more favor from me than strangers."

Our juries are so chivalrous, so considerate to the fair sex, it is almost impossible for a mere man to secure his rights before a jury, without regard to the evidence, when his opponent is a comely and engaging female. Yet, justice is painted blind, and juries are sworn.

I remember an interesting case, in which I appeared for the defendants in the Superior Court of Moore county, many years ago. The heirs of W. B. Richardson brought an action against A. H. McNeill and Louis Grimm to set up a parol trust in certain lands which the defendants had purchased at execution sale against Richardson, as the plaintiffs alleged, for his benefit. The case was tried before a jury in Moore county, and mainly upon the evidence of one of Richardson's daughters, the jury promptly found in favor of the plaintiffs. His Honor, Judge Jacob Battle, as promptly set the verdict aside, as contrary to

the overwhelming weight of the evidence. The case was, on defendant's motion, removed to Chatham county. On the eve of the second trial, McNeill asked me what I thought of his prospects. I told him, with the lady plaintiff testifying against him, he did not have the ghost of a chance. But that if he would don a female garb, and let me present him on the witness stand as *Mrs.* McNeill, he would win. The trial came off without any change in McNeill's sex. The lady testified, and he again lost his case, upon substantially the same evidence as on the first trial. The Supreme Court reversed the judgment on appeal. In the meantime, the Equity Reference Act having passed, the lower court at the next term referred the case to Hon. W. H. Neal, then a member of the bar. Upon the same evidence, he found every issue for the defendant, and his report was confirmed. This is one case out of many where the trial by jury would have resulted in judicial robbery.

As Mr. S. M. Bruce, a distinguished lawyer of the State of Washington, in an article published in the 40th volume of the *American Law Review,* well says:

"The ordinary action for negligence is an every-day example. The average jury will infer negligence against a corporation nine times out of ten, if permitted to determine whether the injured party used ordinary care. It is dangerous to submit the most perfect construction, management, equipment and foresight as a defense. It cannot be relied upon if contributory negligence is not glaring. The exercise of eminent domain is another illustration. Land is made valuable solely by verdict. It may be barren rock, unfit for grazing purposes; or forest swamp, inaccessible save to creatures that fly; but the jury sells it to a railroad for right of way at a price that makes the farmer of arable soil green with envy; and because the jury are judges of the credibility of witnesses, judgment is awarded, absolutely contrary to truth and fair dealing."

It is an instructive fact, that among the nations of the earth which are quite as civilized and progressive as ourselves, the determination of facts in a civil action by a jury is by no means the usual method. In continental Europe, one or three judges without a jury are employed.

In an article in a leading newspaper, the *Standard,* published in London, it was said:

"Trial by jury is supposed to have its root fixed as deep down in the British Constitution as anything which could be named; and yet it is a fact, becoming now so much in evidence that it has formed the subject of recent observations in the legal press, that trial by jury is falling yearly into neglect among the litigants in our courts. Without recounting the statistics which our legal contemporaries have adduced, we may recall to our readers' notice the fact that, alike in the High Court and in the County Courts, where, unlike Criminal Courts, juries are optional, jurors are becoming less and less used for the trial of actions. In the County Courts, only an infinitesimal proportion of the actions is so tried—though a small relative number is. Of course this is not to be wondered at, in view of the nature of County Court business; but when we find fewer and fewer actions tried without a jury in the King's Bench Division, the significance of the decline becomes great, and perhaps still more marked when we see the great disfavor in which jury trials are evidently held in the Divorce Court, with its quasi-criminal subject matter. If the unfortunate litigants in that court increasingly prefer a tribunal consisting of a judge only, it may well be argued that the jury system has fallen into disrepute, and would be abandoned even in the Criminal Courts if our legal procedure permitted of such abandonment."

"The declining popularity of trial by jury," says the *Law Times* of London, "is to be gathered from the County Court returns, where, out of 890,908 actions that were determined in 1904, only 878 were tried by juries (less than one in a thousand), and seems to point to a distinct decline in the jealous veneration for the system of trial by jury as the fairest system of trial ever known and which has for centuries been an incalculable advantage as an instrument of national education."

There is no good reason to doubt the correctness of this statement. In view of the higher standard of education which prevails in England, where the average juror is, therefore, better qualified for the service, and where, presumably, verdicts are more satisfactory than with us, it is a most remarkable com-

mentary upon the wisdom of jury trials. It cannot be explained upon any other theory, than that the jury system, in the land of its nativity, has lost its pristine popularity, and is no longer prized by the people as the safe-guard of their rights.

There is absolutely nothing in the principles of a democracy, which makes jury trial in such actions necessary or useful in the perpetuation of a republican form of government, or in the protection of civil liberties. If so, every time an equity cause is tried by a chancellor without a jury, or by a judge upon waiver of a jury, our boasted privileges of free government are undermined, and a blow is struck at what Mr. a'Beckett facetiously terms the "bulwark in which John Bull can walk triumphantly, the buttress of our rights, the clothes-prop of our liberty, the cloak-pin of law, and the hat-peg of equity."

As Mr. W. S. Scott so well says in his able article, published in 20th *American Law Review*:

"In England, ever since the institution of the Court of Chancery, and in the United States during the entire period of its history, the chancellor, or judge, in equity cases under the Code System, has been entrusted with the decision of questions of fact as various and as complicated as arise in cases at law which may be submitted to a jury. His jurisdiction in equity cases embraces the whole broad field of controverted facts. A glance at the familiar heads of equity jurisdiction will show how conspicuously this is true. Among these are all matters pertaining to trusts, as to their creation, execution and violation, involving as they do questions of fidelity, fraud, due negligence, and such like, and oftentimes questions of damages as well; the almost infinite variety of questions of fact arising under the heads of fraud, accident and mistake; matters pertaining to the notice which will put a party upon inquiry in cases of constructive trusts and frauds, involving examinations into all matters of fact pertaining to the questions of negligence, due negligence, etc., questions of indentity, legitimacy, insanity, undue influence, and the whole range of inquiry which such questions open up; and a variety of other facts, in respect to bequests and testamentary trusts; the manifold questions of fact connected with the specific performance of contracts, and the marshalling and

distribution of assets; the awarding of damages in injunction cases, and in cases of incidental damages for breaches of contract where the equitable jurisdiction has been invoked upon other grounds, and in many other cases.

"A further enumeration would be tedious. These will suffice to indicate how extensive is the scope of inquiry into facts in cases of equitable cognizance—as extensive as the range of human controversies themselves—which can be brought into courts of justice for settlement. It is familiar juridical history both in England and the United States, that in equity cases issues of fact are rarely submitted to a jury, not because the discretion of the court is exercised against such submission, but because it is not invoked. In a vast majority of cases neither solicitors nor suitors desire a jury. Such is their confidence in the ability and impartiality of the judge, that even when the most difficult and involved questions of fact are to be decided, they have no inclination to interpose a jury.

"Nor is the confidence manifested in equity cases only, but the waiver of a jury and the submission of the facts to the decision of the judge in strictly law cases is of constant occurrence. It is of every day practice in the courts of all the States, and in the Federal Courts. In many of the States there are constitutional provisions authorizing the waiver of a jury.

"The constitution of a system which commits issues of fact now to a jury, now to a judge, with no other reason therefor than the position the case occupies on the docket of the court,—on its law or equity side,—is, as respects this feature of it, wholly artificial."

The Honorable Joseph H. Choate, our late ambassador at the Court of St. James, and one of the most accomplished and successful jury lawyers in the land, quite the equal of his uncle Rufus Choate, in an address before the American Bar Association said:

"If jury trial is so good—if it is indeed the palladium of our liberties—then why not extend it into those cases where it does not now exist? Why not extend it into the vast domain of what is called equity, wherever issues of fact are involved, instead of leaving it to the mere discretion of the chancellor to send an is-

sue to a jury? Why not extend it unto the field of admiralty jurisdiction? If a jury is such an admirable body to determine the merits of an action for damages for negligence growing out of a railway collision, why not leave juries to try every suit of admiralty growing out of a collision between vessels at sea? If a jury is an apt body before whom to contest the merits of a question of negligence in operating a railway train, why is it not just as apt a body before whom to contest the question of negligence in towing, or in navigating a vessel at sea? In nearly every jurisdiction in the United States questions of divorce are heard before a single judge without a jury. Of all questions that can excite human attention, if trial by jury is worth a fig, divorce cases should be tried by juries, and not by a single legal scholar on the bench, who may have no experience in his own life such as enables him fitly to estimate the value of testimony and the situation of the parties. If jury trial is such an admirable system let us extend it to the decision of all questions of fact, in equity, in admiralty, and in ecclesiastical cases. If it is a system of doubtful utility, and a bungling and uncertain means of arriving at justice, let us then curtail it, at least in civil cases."

That this boasted bulwark of our liberties does not possess the full measure of our confidence is shown by the alacrity with which counsel often seek to avoid the risk of the verdict of the infallible (?) jury, when upon the conclusion of the plaintiff's evidence, the defendant moves to take the case from it by a judgment of non-suit. How frequently do counsel when appearing for a defendant forego the introduction of valuable testimony, in order to secure the last appeal to the favor and bias and prejudice of the jury, that right (?) may prevail.

"And if this palladium, etc., etc., etc., should give a verdict against the evidence, is it conceivable that the court should be permitted to smash the palladium and batter the bulwark to pieces, by setting the verdict aside?"

The lawyer who knows he has a bad case, which he ought to lose, will not trust the judge. He prefers a more competent and reliable and trustworthy (?) arbiter. Short on facts, his only hope is a jury, upon whose sympathy and prejudices he may play, in order to secure justice (?).

The uncertainty of the issue of a jury trial has become proverbial. It is said to be the only thing which Omniscience does not know, and it has been suggested that "perhaps there is enough of the gamble, the chance of the die, in the outcome, to fascinate the student and to entice the practitioner into becoming its advocate."

We cannot and must not ignore these oft recurring miscarriages of justice. They stand out in bold relief in our professional experience, and are known of all men.

Let us consider some of the causes of this deplorable condition:

JURORS AS A RULE ARE NOT COMPETENT TO TRY THE FACTS OR APPLY THE LAW.

Jurors are sworn to try all cases according to the law and the evidence. It is their duty, on the one hand, to consider the facts testified to; to determine their weight, and to take the law from the court; but they have neither training, education, nor experience for this work. They are frequently uneducated and ignorant. To judge and sift testimony and to detect falsehood require more than ordinary common sense. Jurors are emotional, sympathetic, frequently prejudiced, and often regard their oath as a mere matter of form. It is sometimes a task beyond their powers to apply the propositions of law laid down by the court to the facts of the case.

And yet, as Judge Seymour D. Thompson once said:

"The twelve common men thus selected haphazard from a community to sit as jurors in the particular trial, who have perhaps never sat in a trial before, who find themselves discharging an office new and strange to them, surrounded by strange scenes, like children attending for the first time at school, are by that law conclusively presumed to be able to discriminate properly upon all questions of fact, to detect the true from the false in the testimony delivered by a witness, to weigh the evidence impartially—and all this without any aid or assistance from the bench, beyond instructing them in certain general rules which they are told they may or must apply in determining the weight to be attached to the various elements of the evidence."

I quote again from Mr. Scott's able article:

"The jurors have not merely to decide the disputed facts; they are to decide them according to the law and the evidence. It is a mistake to suppose that all that is necessary in order to do this is to listen to the testimony, and to receive the propositions of law from the court, with such aid as may be derived from the arguments of counsel. When all this has been done, the jurors have only fairly entered upon their work. Their most difficult duties are yet to be performed. They encounter these when they retire for consultation and deliberation upon their verdict. They must now weigh all the testimony to which they have listened, and thoroughly analyze it. To do this properly and profitably, this testimony must be carefully sifted, and its details collated; conflicting testimony must be reconciled where reconcilement is possible, and where reconcilement is impossible, a wise discrimination must be exercised in selecting from this testimony that which is most trustworthy. From the mass of testimony—oftentimes a maze of contradictions—the evidence which establishes, or most strongly tends to establish, the very truth of the matter must be extracted; and to do this successfully there must be a clear comprehension of the real points at issue.

"To do all this properly and well demands a more than ordinary exercise of the reasoning faculties; and if it does not require, at any rate will be greatly aided by mental discipline, and mental training in this character of intellectual work.

"The very constitution of this tribunal, made up of persons brought indiscriminately from the body of the people, and who come to the discharge of this duty unimpressed with the necessity of excluding all extraneous matters and influences; not qualified by mental training and discipline to exclude them even when the necessity for it had been perceived; with no sufficient capacity for discrimination between what might appear to them to be the right of the matter from the standpoint of their individual convictions, and what must be regarded as the right of the matter when confined to the evidence under the law as given them by the court, makes the jurors susceptible to those influences which may and so frequently do, contaminate their verdict with passion or prejudice.

"These are infirmities in the system which do not arise so

much from moral obtuseness in the juror, as from misconceptions of the limitations upon his powers in the investigation of the facts; misconceptions which this very lack of mental training makes so difficult, if not impossible, to remove. His brief service in the courts furnishes no sufficient opportunity for their removal, even if he were mentally qualified."

My distinguished predecessor, Mr. Clement Manly, in an able and instructive address before this body, said:

"While it is evident to us, that juries in North Carolina should be both capable and intelligent, what situation, my friends, confronts us in almost every court house? Let us frankly and truthfully consider it; a panel composed of men of little experience in matters necessarily coming before them; so often, of men whose only claim to this responsible position is their urgent need of the *per diem*. Is not this true? and equally true the logical result—unjust verdicts? My experience tells me you cannot and must not ascribe this condition to venality, or even to the ignorance or prejudice of the jury; though to that low estate do we sometimes fall. Such verdicts are the natural and expected results coming from men who have little experience in the matters involved in the cause considered. They do their best; often deliberating long and earnestly, but having no training in, or knowledge of, the particular business presented, and having no experience in the matters or custom involved in the controversy, the end is, and at times must be, against the rightful cause."

It is the duty of the jurors to take the law from the court, although by our statute counsel are expressly permitted to argue to them the law as well as the facts. Not infrequently the jury undertake to decide the law according to their own sweet will, and arrive at wrong conclusions. If the evidence is conflicting, it is impossible for the court to know whether or not the jury has disregarded its instructions—a ground for setting aside the verdict. In Illinois and some other States, I am informed, there was an old law on the statute books to the effect that in criminal cases the jury "is judge of the law as well as the facts."

In one case the judge instructed the jury that it was the judge of the law as well as the facts, but added that it was not to judge

the law unless it was fully satisfied that it knew more law than the judge. An outrageous verdict was brought in contrary to all instructions of the court, who felt called upon to rebuke the jury. At last, an old farmer arose. "Jedge," said he, "wern't we to judge the law as well as the facts?" "Certainly" was the response, "but I told you not to judge of the law unless you were clearly satisfied that you knew the law better than I did." "Well, Jedge," answered the farmer, as he shifted his quid a little, "we considered that p'int."

There are many other defects in the system. The delays and costs of litigation are very great. Sometimes days are consumed in the selection of a jury. Then again, there are wearisome and needless contests over the admission of evidence. An appeal from an error in admitting or excluding evidence may necessitate a new trial. The judgment is not corrected, but a new trial is ordered, to begin anew the series of blunders and appeals.

Property rights are unsafe where they depend upon the whim, prejudices or ignorance of an irresponsible jury. Apprehending a jury's blunder the prudent man will often compromise a plain right, rather than take the chances of a trial before this uncertain tribunal.

The civilization of this age does not permit the citizen with a strong hand to settle his disputes with his neighbor. It provides him with a forum for this purpose. It is, therefore, the duty of that civilization to furnish that tribunal and that system or mode of trial, which will make justice as sure as possible.

Ours is a conservative profession. We love to stand by the ancient landmarks—to walk in the ancient ways. But, we are living in an age of progress. We have witnessed in our generation, the demolition of a system of practice and pleading which had grown hoary with age, and the substitution of a simpler procedure. I can well remember how, when I first came to the bar, the lawyers of the old regime inveighed against and denounced this striking down of their ancient idol. And yet, who of us would return to the days of declarations, pleas, replications, rejoinders, sur-rejoinders, rebutters, and sur-rebutters? Who would disturb the peaceful slumber of John Doe and Richard Roe, who for half a century have been quietly resting in their comfortable graves?

No. If the trial by jury in civil cases, with all its faults, is the best, let us retain it, and if possible, correct them. If it is not, let it be abolished and a better system substituted. If necessary the surgeon's knife should be remorselessly applied. We owe it to succeeding generations to hand down to them the surest and safest administration of civil justice.

WHAT IS THE BEST SUBSTITUTE?

I verily believe that all issues of fact in civil cases can be more safely, more certainly, more satisfactorily determined by one or three honest, impartial, able, learned, and experienced judges.

As Mr. W. S. Scott in his article, "Should Trial by Jury in Civil Cases Be Abolished," well says:

"Surely the man who has had large acquaintance with court trials, who, as a part of his vocation in life, has had to listen to the testimony of witnesses and to carefully weigh their testimony, whose mind has thus become trained as well by the character of his education to the logical processes of thought, and to the ready detection of fallacies in respect to the argument which may be addressed to him upon the testimony, is better capacitated, other things being equal, to arrive at a correct determination of the issues involved, than the man who has had no such experience and no such training. * * * * * May it not be safely asserted that the man who has studied the law as a science, and who has made the comprehension of legal principles the business of life, is better capacitated to apply the law to the facts, than the man who is ignorant of the law, and who has neither training nor experience in the application of legal principles?"

He further says:

"It is also argued that the jury, coming fresh from contact with the affairs of every-day life, can better understand and decide controversies growing out of these affairs, than the judge can. But is this true? Judges are not taken from cloistered retreats and elevated to the bench. They are, as a rule, called from active practice, and from a large and varied experience with the daily affairs of life, to preside in the courts. With rare exceptions they are men of practical sense and experience. In

both methods of trial, judge and jury alike must decide according to the evidence given at the trial.

"We think also that the judge is controlled by a higher sense of responsibility than impresses twelve men called in for the time being from the busy scenes of life to pass upon the issues of fact in a particular case, and then to disappear from view again, and resume their various avocations. His position, as compared with theirs, is a permanent one. His office is one of prominence and dignity. He knows that his highest claims upon the profession and the people who elevated him to this position are to be found in the qualities of integrity and impartiality, coupled with ability to comprehend and apply the law, which he exhibits in his judicial career.

"Again, it has been urged against substituting the judge for the jury that our State judiciary is in the main elective, and the terms of office short; that where influential citizens are suitors the independence of the judge is threatened, and the rights of the more obscure litigant thereby imperiled, if the contested facts must be submitted to him; that he is apt to lean to the side of that party whose influence in the next election may be most valuable to him. But such influences have never been found to have weight in that vast class of cases constantly occurring, in which the facts are tried by the judge without the intervention of a jury.

"It has been argued in favor of the retention of the jury system that it serves to educate the citizen in legal principles, as well as in court procedure; that he thereby obtains a juster conception of his own civil rights, and of those of his neighbor. But it should be remembered that courts of justice are not organized for the purpose of being educational institutions; but for the trial of causes."

It has been urged by the advocates of its retention, that a jury is better suited than the judge to decide cases sounding in damages, as for example, actions in tort for injuries by a railroad corporation. The lawyers, if any there be, who fatten on contingent fees arising from excessive verdicts in such cases, may strenuously oppose dispensing with the instrument by means of which such verdicts are secured. This would be a selfish and un-

worthy objection. A high standard of morals in the practice of our profession should not encourage any method of trial which usually results in the adoption of an unjust measure of damages.

The *Solicitor's Journal* (London), of December 23, 1905, contains some severe reflections upon this subject:

"Railway companies have been considered fair game for the attacks of unscrupulous persons ready to invoke the aid of the law in order to extort money by unfair means. Jurymen, who hold the scales of justice with so much fairness between man and man, act very differently when the question is between man and company. Hence the courts of justice are made engines for forcing money out of railway companies by many persons of very varying degrees of moral obliquity. Every day we hear of the case of the man who has really received some slight injury through the negligence of a company, but who unconscientiously aggregates his damages in the most extravagant way. Then there is the man who has been hurt by his own negligence, but who trusts to the well established bias of juries in grasping at any shadow of an excuse for charging the company with negligence. Hundreds of such claims are settled by the companies in full knowledge of their unfairness, for the chance of a verdict in their favor is generally small; even if they win they often get no costs out of a defeated plaintiff, so that a victory may be more expensive than a moderate settlement."

As says Mr. Scott: "So far from such cases of discretionary damages being better suited to trial by jury, there would seem to be weighty reasons why this class of cases should not be passed upon by a jury. In these there is greater room and stronger temptation for the exercise of prejudice, or of unwarranted sympathies, than in any other class of cases. The infirmities of trial by jury are specially conspicuous here. The widespread dissatisfaction with juries is to be traced, in large measure, to this very class of cases."

The following additional considerations for the abolition of trial by jury in civil cases, and the substitution of the judge as trier of the facts, are offered:

"First. Cases would be disposed of more expeditiously.

"All the time consumed in the impaneling of the jury would be saved.

"New trials because of misconduct of jurors would no longer exist.

"Thus the delay from the retrial of cases, and the consequent delay in their final determination,—one great cause of the prevailing dissatisfaction with the administration of law in the courts of justice,—would to a great extent be obviated."

"Second. The expense of lawsuits would be greatly lessened.

"The expense saved in this way would provide for the additional judges which the abolition of jury trials would doubtless necessitate; giving them adequate salaries, and allowing an increase in the present salaries of the judges now on the bench. It would also allow the employment of a court stenographer to take down the testimony in shorthand, and to transcribe it for the use of the judges at chambers and of the lawyers in making up bills of exceptions.

"Third. It would elevate the standard of the legal profession, and in doing so would give a new dignity to the administration of the law. It is the opportunity which jury trials affords for harangue, for *ad captandum* argument, for unworthy appeal to passion and prejudice, for indulgence in intemperate and unprofessional discussion of the testimony, as well as for improper methods in conducting the trial itself, so as to influence the minds of the jurors, that causes pettifoggers in the profession; individuals who pursue the practice of law, not as a learned and dignified profession requiring continuous study to master its principles, and severe mental training and discipline to conduct the trial of causes, but as a trade in which effrontery takes the place of eloquence, and abuse of argument.

"Fourth. The only remaining obstacle to the unification of the judicial system by the abolition of all distinctions in methods of trial in cases legal and equitable, would be removed."

I would recommend that all civil actions be tried by three nisi prius judges, who shall rotate, and thus avoid all possible local influence, prejudice or favor. I would increase the number of these judges in the State, and in order to secure the highest order of talent, and attain the fullest guarantee for the correct administration of the law, I would give them salaries commensurate with the labors and responsibilities of the judicial office.

I would provide them with the necessary court stenographers. The revenue saved from the abolition of jury service would more than meet all the additional expense of the changes here advocated.

This brings me to the consideration of the question *how can the great reform be effected?*

(We omit here a very learned discussion of the right to abolish jury trials in common-law actions without an amendment to the North Carolina Constitution.)

The purging of the jury list should be committed to a non-partisan and non-elective body, composed of men of the highest probity and intelligence, to be appointed by the Court, and they should perform their office in executive session, so that they may not be influenced by personal considerations, or be subjected to criticism, for the independent discharge of their duty. A higher standard of intelligence should be adopted in the selection of jurors. None should be called upon to perform this important function of passing upon the liberties and rights of the citizen but those who are *well qualified* for the duty. None but free-holders, as in the case of *talesmen* should be chosen, and preferably men of education, substance and affairs. No one should seek the duty. None should shirk it. There is nothing really attractive in the *per diem,* and a juror to whom this is an inducement is generally an unfit person.

Mr. Manly, in his admirable address before this Bar Association, said:

"The jurors are not taken from all the people, but from only a part of the people. Statutes, either by express terms, or more certainly by a pernicious use of their provisions, exempt a large and intelligent portion of the population, and there are many exemptions which, I respectfully urge, are enacted without just reason, and not conceived in the true spirit which should govern this service in the state. Of these exemptions, 'members of the fire companies and of the state guard,' deserve our consideration. These organizations which have the gratitude of the people for public service, are not bodies constituted with such duties as require exemption, nor do they perform service of such character as to demand a release from this important obligation. Such

exemption is not required for the good of either of said organizations, and the efficiency of either would not be effected by one or two of its members being in the actual trial of a case, even when the company was actually engaged in service;—at best a rare coincidence. And, certainly, the state does require for jury duty the service of just such men, chosen from a strong class of its citizens; active men and generally of character and intelligence. I am certain that the importance of the obligation of jury service was not considered in the enactment of these statutes, and I assert that such citizens should not be relieved of a duty which they owe themselves and the state, as pay for service which they voluntarily give the public."

Mr. Manly pertinently asks: "Who among us, except in instances so rare as to startle us, can recall seeing the chief officers of a bank, railroad or other large corporation or business firm, owners of cotton mills, foreman of shops, or distinguished ministers of religion, sitting in the jury box in the trial of a case, and yet, why not? Is there any law exempting them? Are they exempt from the duties and obligations of citizenship? Have these gentlemen business of such personal importance as permits them to neglect this duty of serving the state in the administration of justice?"

I would repeal every exemption, and I would not excuse any citizen from this most important duty, lawyers and court officers alone excepted. I would leave it to the discretion of the presiding judge, in any extreme case to excuse.

Causes of Challenge Should Be Restricted.

By reason of the great liberality allowed by law in challenges, peremptory and for cause, it not infrequently happens that the jury is composed of the most ignorant men in the community. There are many cases brought on for trial in which the counsel for one side or the other knows that his only safety lies in excluding from the jury men of intelligence. This is no reflection on the counsel, whose loyalty to a client requires him to use all lawful and honorable means to secure a favorable verdict; but it is a severe condemnation of the law which sanctions such practice.

As Judge Deady has well said:

"In this age and country, when and where every occurrence of any interest or importance is more or less circumstantially reported in the newspapers, and read or noticed by most persons of ordinary intelligence and responsibility, if an opinion formed from reading these accounts, or hearing the same repeated in common conversation, is allowed to be sufficient cause of challenge to an otherwise indifferent juror, it follows that trial by jury is degraded to a trial by the ignorance and dishonesty of the country, instead of its intelligence and integrity.

"By means of challenges allowed for such cause, it too often happens that the best qualified persons on the panel are set aside, and the jury is formed in some part, at least, of such persons as neither read nor hear what is going on in the world around them, or are dishonest enough to conceal or deny the fact, for the purpose of defeating the challenge and getting on the jury so as to find a dishonest verdict, or prevent an honest one.

"The kind of jury trials to which we are drifting in the United States is a gross travesty of that known to the fathers. By the means which I have mentioned, the court is more or less muzzled and the jury emasculated. The trial is converted into a mere game of skill between counsel, in which the chance is largely in favor of the better, if not the sharper player, without much reference to the law or justice of the case."

If a juror has formed or expressed an opinion from reading newspaper reports or upon rumor, and notwithstanding, testifies that his opinion will not prevent him from rendering an impartial verdict on the evidence adduced upon the trial, and the court is satisfied of this, he should be accepted.

TALESMEN ARE FREQUENTLY UNDESIRABLE JURORS.

As a rule, the most dangerous juror is the *talesman,*—the idle hanger-on in the court house, hungry for the pitiful *per diem* of a juror, sometimes obtruding himself to be called by the sheriff in order to serve a friend, sometimes present by invitation for that purpose. *Jurors should never be called from the by-standers.* If necessary, the sheriff should be directed by the court to go outside and summon the best men to be found.

But even this should not be necessary. A sufficient panel should be summoned in the first instance. *At least two full regular juries should be in attendance on the court.* This plan has been adopted by some of the counties, and as a result the occupation of the jury-fixer is gone, and a better class of jurors has been secured.

Judges Should Be Permitted and It Should Be Their Duty to Aid the Jury by the Expression of an Opinion upon the Facts.

I can add nothing to the well considered and persuasive remarks of that distinguished lawyer who has heretofore addressed you upon this branch of my subject. I shall take the liberty of quoting from the able address of Mr. George Rountree, a former President of the Association:

"If it should be asked how it is proposed to increase the power of the judges, I suggest that they should have the right, and it should be their duty, to express an opinion upon the facts and to direct the verdict in proper cases; provided always, that when there is conflicting evidence the issue of fact is left to the final decision of the jury; and, provided further, that the whole record should be reviewed by the appellate court to ascertain if any substantial legal injury has been done to the appellant. * * *

"And this power, as I have suggested, should extend to the right, subject to review by the appellate court, to direct a verdict whenever in the opinion of the trial judge the case has, or has not, been made out by evidence about which reasonable men could not honestly differ. This is the doctrine of the federal courts and it is the practice of those of England. It is stated by Mr. Justice Brewer, delivering the opinion of the court, in Patton *v.* Railway Company, 179 U. S. 658, as follows:

" 'That there are times when it is proper for a court to direct a verdict is clear. It is well settled that the court may withdraw a case from them [the jurors] altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. * * * It is undoubtedly true that

cases are not to be lightly taken from the jury; that jurors are recognized triers of questions of fact; and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. * * * Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, *the judge is primarily responsible for the just outcome of the trial.* He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment.'

"In the case of Metropolitan Railway Co. *v.* Jackson, 3 App. Cas. 193, that great master of the common law, Lord Blackburn, also stated the rule as follows:

" 'It was formerly considered necessary in all cases to leave the question to the jury, if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review), is, as is stated by Maule, J., in Jewell *v.* Parr, "not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." '

"Speaking of a statute similar to ours, Professor Thayer says:

" 'It is not too much to say of any period, in all English history, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the court in dealing with the facts. *Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words.* It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected.' "

Mr. Rountree further says:

"And practically the same provision is contained in the constitution of the United States, and it has never been held to

trammel the judge in the performance of his ancient duties. Referring to this matter, Mr. Justice Gray, speaking for the court (in U. S. *v.* Phil. & Reading R. R. Co., 123 U. S. 113), said:

" 'Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objection to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination.'

"I submit therefore to your consideration that a decided change is necessary in the administration of law, and that the only feasible way in which such change can be made, and made effective without a revolution in our methods of procedure by which we would lose the inestimable benefits of the historical trial by jury, is to restore to the judicial office its ancient powers and prerogatives.

"Naturally there will be some hesitancy on the part of the members of the bar in full practice to agree to such a change, but a little reflection will show that in the nature of things confidence must be reposed somewhere in the officers who administer the law, and I submit that it is equally as safe to trust to the trained intelligence of a man fit to be judge, as it is to trust to the uncontrolled action of an irresponsible jury."

In the case of Ely *v.* Early, 94 N. C. 9, an equity cause, our court held that if the lower court should be of opinion that in no reasonable view of the whole of the evidence produced on the trial of issues, it is sufficient to warrant a verdict ascertaining the fact of mistake, then it ought to direct the jury to find the negative of the issue.

The province of the jury is to be the ultimate judges of the facts. It is no invasion of this province for an able and impartial judge simply to assist them in coming to their conclusion. If truth is the desired goal, and it can be more certainly reached with the assistance of a judge, whose experience enables him to materially aid in this ultimate purpose of trial, what is the objection? Is error more to be prized because the jury in their

unaided gropings, have fallen into it, than truth reached with the assistance of the court?

THE UNANIMITY RULE SHOULD BE ABOLISHED.

The rule that the verdict of the jury must be unanimous has come down to us from our ancestors. This is its chief excellence. Eleven cannot truly solve the problem submitted to them, without the aid of the twelfth juror, because the truth reposes only in the twelfth! In all bodies, executive, judicial, deliberative, legislative, a bare majority suffices. In the courts of common law and the courts of appeal in chancery, when the judges differ in opinion, that of the majority prevails. When in the House of Lords a peer is tried for crime, a bare majority of one is sufficient to convict; in the Supreme Court of North Carolina a majority of one decides the question of law, and in the Supreme Court of the United States in equity causes the most difficult questions of fact, as well as of law, are decided by a majority of one. As Mr. Forsyth asks, "should the rule be different for twelve jurors, and why, if there be a single dissentient among them, can no verdict be given?" It seems to be a matter of indifference how the concurrence of the twelfth man may be secured, whether by the agency of close confinement, or depriving the jury of meat, drink, fire and candle, as of old, or what not, the truth is reached only when the twelfth man succumbs. It may be that the dissenting juror is honest in his convictions; doubtless he is; but he must be *persuaded* and join the majority, although "he that complies against his will is of his own opinion still." He may stand out, either from fixed convictions or from ill-will or partiality to the suitor. He may have been selected as a juror for the purpose of hanging it, "for under the unanimity system, any one juror gained and properly armed—armed with the necessary degree of patience—suffices. The result—a mistrial and the trouble and expense of another trial."

Hallam terms the unanimity rule, "that preposterous relic of barbarism so long ago stigmatized as repugnant to all experience of human conduct, passions and understanding."

Lord Chief Justice Cockburn said:

"Our ancestors insisted on unanimity as the essence of a verdict but were unscrupulous as to how the unanimity was ob-

tained: The unanimity rule is responsible for an enormous number of mistrials, loss of time; loss of money; delay in justice. It gives an opportunity to a stupid or prejudiced or corrupt man to stop the wheels of justice."

The English common-law commissioners of 1831 condemned the rule in very positive language, and proposed that the jury shall not be kept in deliberation longer than twelve hours, unless at the end of that period they unanimously agree to apply for further time; and that at the expiration of twelve hours, or of such prolonged time for deliberation, if nine of them concur in a verdict, it shall be taken.

Dr. Francis Lieber, in his "Civil Liberty and Self-Government," and more particularly in an article in the *American Law Register* for 1867, is outspoken in his condemnation of the practice of requiring unanimous verdicts.

Bentham, in his "Essay on the Art of Packing Juries," says the unanimity "could not have been the work of calm reflection, working by the light of experience," and he calls it "no less extraordinary than barbarous."

Judge Cooley, in his edition of Blackstone, characterizes it as "repugnant to all experience of human conduct, passions and understandings," and further says that "it would hardly in any age have been introduced into practice by a deliberate act of the legislature."

Ex-Governor Keerner, of Illinois, calls it "The illogical unanimity system, which has become a great source of corruption and consequent denial of justice."

Mr. Zeisler, in a well considered article upon this subject, forcibly states the arguments against the requirement of unanimity in jury verdicts; saying it is absurd, in that it gives one mind weight equal to that of eleven; is unsound, in that eleven honest and intelligent men may be defeated by one fool or crank; and is morally deficient in that it constantly holds out a premium to the professional jury manipulator.

In the American Bar Association report on "Jury Verdicts by Three-Fourths of the Jury," of August 26, 1891, it is said:

"As has been finely said, trial by jury is itself upon trial at the bar of public opinion. Men have been gradually losing their

admiration for it and more and more mistrusting its efficiency as a means of doing justice. Why is this? More than from any other causes, for the reasons that the verdict of the jury under the unanimity rule is so often, in the opinion of both sides, not the justice of the case, but a compromise, and because that rule so often produces a mistrial."

Hon. Thos. Ewing, a United States Senator, and leading lawyer of Ohio, speaking of this rule, said:

"The day is not far distant when, if the absurd and injurious requirement of unanimity is adhered to, trial by jury in civil cases will be abandoned. I think it is a political duty of the American patriots and statesmen to free the jury system of this defect and thus insure its perpetuity. It is one of the vital forces of popular government. The requirement of unanimity, a belated rule of forgotten and barbaric form of trial by witnesses, became incorporated without reason to support it in the English system of jury trials in civil cases, and has been handed down from generation to generation as though it were one of the jewels of our race. If it were merely useless, we might excuse our weakness in preserving it; but as it is also hurtful and tends to weaken the respect of the people for the jury system, it ought to be abolished."

A distinguished justice of the United States Supreme Court advocated the reform on these lines:

"I am of the opinion that the system of trial by jury would be much more valuable, much shorn of many of its evils, and much more entitled to the confidence of the public as well as of the legal and judicial minds of the country, if some number, less than the whole, should be authorized to render a verdict. I would not myself be willing that a bare majority should be permitted to do this."

Lesser, in his history of the Jury System, says:

"Were the abolition or modification of this requirement (the unanimity rule), secured, the character of the institution would soon be ameliorated, and the two ulcers which mainly disfigure its countenance—bribery and jury-fixing—would speedily disappear. For *first,* corruption is less practicable, where a majority must be made to succumb to its influence; *secondly,* hope

of the profit can no longer act as an inducement for worthless persons to serve as jurors, since the purchase of their votes would be an unpromising investment; *thirdly,* the occupation of jury-fixer will become a thing of the past, since he will no longer have fit subjects to operate upon, nor parties eager to employ him; *fourthly,* and consequently, men of capacity, standing, and integrity will with more readiness consent to serve, since their opinion must then carry its proper weight and can no longer be nullified by their intellectual inferiors; *fifthly,* and finally, trials will become shorter, service in the jury box less exacting, and the status of the legal profession itself will be benefited by the change; for the labor of the advocate can no longer be confined to the aim of causing an individual to dissent, but must assume the nobler and broader form of an endeavor to convince the majority of the justice of his cause."

The learned Lord Campbell urged the repeal of the unanimity requirement in civil trials, as a logical deformity and gross obstruction to the due administration of justice.

Judge Henry C. Caldwell of the United States Circuit Court, in a paper read before the Missouri Bar Association at its last meeting, said:

"If unanimity were tantamount to infallibility there would be some reason for the rule, but there is no more infallibility in twelve men than in seven or in nine. Its baneful effects on the jury and on the administration of justice are very great. The superstition should be abolished by law."

In a number of states it has been abolished.

This improvement of the administration of justice in civil causes can be made only by constitutional amendment. (Smith *v.* Paul, 133 N. C. 68.)

I recommend that a proper committee of this association be directed to draft for presentment to the General Assembly for its action, a constitutional amendment, providing that in all civil actions three-fourths of a jury may render a verdict.

Setting Aside of Verdicts.

A great defect in our system of trials is the reluctance with which judges set aside the verdicts of the juries. There is noth-

ing sacred in the verdict of the twelve fallible men. They frequently make mistakes. Of course, it is not a pleasant duty for the judge to tell the jury that they have blundered. The usual formula in denying a motion for a new trial is, "I am averse to disturbing the verdict of a jury." If it is wrong, it ought to be disturbed. The judge who said "it takes thirteen men in my court to deprive one of his land" was eternally right.

Mr. Forsyth says:

"The supervision of verdicts, as it is exercised by the courts of law in this country, not only does not render the jury trial illusory, but increases its efficiency in a remarkable degree. Whatever may be the nature of the tribunal, it would be an intolerable hardship if no means existed of correcting its mistakes, which must sometimes inevitably occur in the course of investigating difficult and complicated questions of fact."

Frequently in no other way can the fearful wrong of unjustly depriving a man of his property be righted. In law and in morals, the judge has no right to allow an erroneous verdict to stand; and when he does, believing it to be wrong, he becomes a participator in the injustice perpetrated by the jury. The court renders no verdict, when it sets it aside. It simply vetoes a bad one.

The Revisal, section 554, sub-div. 4, provides:

"The judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages."

It has been decided that a statute authorizing a new trial for *insufficient evidence,* confers power to grant a new trial when the verdict is against the weight of the evidence. McDonald *v.* Walker, 40 N. Y. 551; Metropolitan R. Co. *v.* Moore, 121 N. S. 558; Inland, etc., Coasting Co. *v.* Hall, 126 U. S. 121.

In Alaska, Arkansas, California, Connecticut, Florida, Georgia, Kentucky, Massachusetts, Mississippi, Missouri, Montana, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia and also in upper Canada and New Brunswick, the trial judge may set aside a verdict which is *against the weight of the evidence.*

In Rick *v.* Ulmer, 144 Ind. 25, it was held:

"The judge of the trial court does not sit as a mere moderator to record the will of the jury. He has other functions and duties to perform, which he cannot lawfully escape or evade, and when a verdict is returned unwarranted by the evidence, he must set it aside and grant a new trial when asked for."

In many cases, it has been held, that where the trial judge entertains the opinion that the verdict is against the weight of the evidence, it is his imperative duty to grant a new trial.

In Dickey *v.* Davis, 29 Cal. 569, the court said:

"Whilst the court should be careful not to trench upon the province of the jury in deciding facts, where the evidence is nearly balanced, it is equally true that it is its duty to set aside the verdict when plainly against the weight of evidence, even though there may have been conflict in the testimony."

I would by statute require the trial judge, in passing upon a motion to set aside the verdict, to find that the verdict is, or is not, in his opinion, against the weight of the evidence, and to set it aside whenever, in his opinion, it is against the weight of the evidence.

THERE SHOULD BE AN APPEAL TO THE SUPREME COURT FROM A REFUSAL TO SET ASIDE A VERDICT WHEN IT IS MANIFESTLY AGAINST THE WEIGHT OF EVIDENCE.

The error of the lower court in setting aside, or refusing to set aside, a verdict may work a grievous and irreparable wrong. If the whole evidence, as certified by the appellate court, discloses a case, in which it is apparent that the jury could not have reached their conclusion, save by mistake, or misapprehension of the legal effect of the evidence, by passion or prejudice, or in which the verdict was plainly and manifestly against the weight of the evidence, an appellate court should set it aside.

Such appeals have been allowed in the following thirty-five states and territories of the union: Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Florida, Illinois, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Pennsyl-

vania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and also in the District of Columbia, British Columbia, New Brunswick, Nova Scotia, Prince Edward's Island, Ontario, and England.

The setting aside of unjust verdicts is one of the most important functions of the judicial office. The errors of law of the lower court may be corrected on appeal. The mistakes of fact of the jury are irremediable, unless the lower court shall be required to interpose. If this court refuses to do so in a plain cause, why should not *its* error in so refusing, be corrected.

Doubtless this appellate jurisdiction will entail much labor in our supreme court; but it would be found in practice that only exceptional cases will be taken up on this ground. However this may be, there is an imperative necessity for review, in order that justice may be done. *Fiat justicia, ruat coelum.*

I have finished the task set before me, how imperfectly, no one knows better than myself. Many of the reforms which I have advocated will, I am sure, meet your hearty approval. About some of them you will differ, but you will at least agree that they merit serious consideration. I hope to see some of them adopted in the few short years of professional life which I trust are still before me. Others in time will surely come, not in your day, nor mine, but in later years, after we shall have pleaded our last cause before a jury of fallible men, and shall have been summoned hence, to await our own trial before the Great Judge, whose findings are eternally true, and whose judgments are everlastingly righteous.